(8)

No. 92-466

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LIGGETT GROUP INC.,
now named Brooke Group Ltd.,
Petitioner,
v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF GROCERY MANUFACTURERS OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Of Counsel:
ELIZABETH TONI GUARINO
Vice President,
General Counsel
GROCERY MANUFACTURERS OF AMERICA, INC.
1010 Wisconsin Ave., N.W.
Suite 800
Washington, D.C. 20007

C. DOUGLAS FLOYD
PILLSBURY MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104

TERRY CALVANI *
W. TODD MILLER
PILLSBURY MADISON & SUTRO
1667 K Street, N.W.
Suite 1100
Washington, D.C. 20006
(202) 887-0300
Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23 pp

QUESTION PRESENTED

Whether the Fourth Circuit correctly affirmed the district court's determination that Liggett failed to establish that, in the absence of collusion or monopoly power, the unilateral decision of a competitor having less than a twelve-percent market share to compete by cutting price did not create a "reasonable possibility" of competitive injury because the strategic reaction of other competitors in the market could not be assumed and because competition within the stipulated relevant market was not, and could not have been, injured.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-466

LIGGETT GROUP INC.,
now named Brooke Group Ltd.,
Petitioner,
v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF GROCERY MANUFACTURERS OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT [1]

THE INTEREST OF AMICUS CURIAE

The Grocery Manufacturers of America, Inc. ("GMA") is a non-profit voluntary business association incorporated under the laws of Delaware. GMA represents more than 130 companies that manufacture and distribute products primarily sold in retail grocery stores throughout the United States.[2] These generally include both "branded"

---

[1] Peitioner and Respondent have both consented to the filing of this brief; the written consents are on file with the Clerk.

[2] Among GMA's members are many of the best known grocery manufacturers in the United States participating in such diverse markets as frozen, refrigerated, shelf-stable, and fresh foods, bakery

and "generic"[3] products. GMA's member companies employ more than 2.5 million people and have annual sales of more than $250 billion.

GMA and its members have had a longstanding, keen interest in matters relating to the sale and distribution of products sold in retail grocery stores in the United States. This includes the interpretation and enforcement of the federal antitrust laws, especially the Robinson-Patman Act. The Robinson-Patman Act was enacted in 1936 at the behest of a wholesale grocers' association to address alleged pricing abuses in the grocery manufacturing industry.[4] Since the Act's adoption, numerous cases have been brought that involve this industry. Indeed, the grocery manufacturing industry can be viewed as the Act's "test tube"; many of this Court's Robinson-Patman Act opinions involve grocery products.[5]

In this connection, GMA believes that vigorous price (and non-price) competition should be encouraged in an environment where the rules regulating such competition are clear, predictable, and rational. This is particularly true in an industry like the grocery industry: Branded products compete with other branded and generic products

products, beverages, paper products, dairy products, cereals, snack foods, toiletries, household cleaning products, etc.

[3] As used herein, "generic" includes store brands, private label, and black-and-white non-branded products that are usually sold off the store shelf at prices lower than branded products intended for the same use.

[4] *See generally In re General Motors Corp.*, 103 F.T.C. 641, 691 (1984). *See also* F. Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-23 (1962).

[5] *See, e.g., Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Borden Co.*, 383 U.S. 637 (1966); *United States v. Borden*, 370 U.S. 460 (1962); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

each and every day and price competition is multifaceted. In the grocery manufacturing industry, as in the cigarette industry, there are list prices which are affected by rebates, coupons, volume discounts, shelf payments, etc. This makes pricing decisions complicated, but critical to the competitiveness of the industry. To expose countless pricing and competitive decisions in industries that are arguably moderately concentrated to treble damage liability based on a claim that they were made with "predatory intent," as Liggett proposes, would have a severe chilling effect on the very price-cutting decisions that lie at the heart of the competitive process and that result in benefits to consumers.

GMA's particular interest in this case arises from its belief that the ramifications of this particular antitrust decision are likely to extend well beyond the specific facts before this Court and affect the efficient operation of our economy and legal system. Petitioner Liggett has advanced a novel theory of Robinson-Patman Act liability that was rejected on factual, legal, and economic grounds by the courts below. GMA is concerned that adoption of Liggett's theory will not only encourage unsound Robinson-Patman Act treble damage litigation, but will create a great deal of uncertainty with respect to pricing decisions in industries, such as grocery manufacturing, where branded products compete vigorously among themselves and with generic products for acceptance by consumers and where volume discounts are prevalent. This would ultimately result in increased costs to consumers for basic needs. GMA (and its members) therefore has a substantial interest in this case.

STATEMENT

Brown & Williamson Tobacco Corporation ("B&W") and Liggett Group Inc. ("Liggett") are, among other things, two of the smaller manufacturers of cigarettes. Both companies distribute cigarettes through wholesalers and directly through retailers, and both companies com-

pete nationwide with the much larger (in terms of cigarette sales) Philip Morris U.S.A. and R.J. Reynolds Tobacco Company ("RJR"), as well as Lorillard, Inc. and American Tobacco Company. Pet. App. at 20a-21a.[6]

In 1980, Liggett was the first of the major U.S. cigarette manufacturers to enter the relatively new "generic" segment of the cigarette market by providing a grocery chain with its own private-label cigarettes. Liggett later began offering unbranded or "black and white" generics (so-called because the cigarettes are sold in plain white packages with black lettering indicating the type of product) at volume discounts. *Id.* at 21a. As noted by the trial court, "[g]eneric cigarettes were an unqualified success for Liggett. The segment grew steadily, and by mid-1984 generic sales accounted for 4.1% of the total United States cigarette business with Liggett holding *ninety-seven per cent (97%) of the segment.*" *Id.* (emphasis added).

In 1983, first RJR and later B&W responded to the growing competition from generics by offering value-priced branded generics. RJR marketed "Century" with 25 cigarettes per pack (in contrast to the usual 20-cigarette pack). B&W sold "Richland," also with 25 cigarettes per pack. *Id.*

The competition continued. In May 1984, RJR attempted to counter the increased popularity of generics: it "repositioned" its full-price brand, "Doral," by matching the list prices of Liggett's generics and by offering volume discounts greater than Liggett's. *Id.* at 21a-22a, and n.12. Responding to the competition, B&W made plans to offer black and white, additional value-priced branded, and private label generics. But B&W's parent, BATUS, approved only the sale of black and whites and directed B&W to make a profit. Jt. App. at 442.

[6] The following citation abbreviations are used in the brief. "Pet. App." refers to the Appendix to Liggett's Petition; "Pet. Br." refers to Liggett's Brief on the merits; and "Jt. App." refers to the Joint Appendix filed with this Court by the parties.

Later in May 1984, B&W announced the intended introduction of its new generics along with proposed list prices and discount schedules. Pet. App. at 22a. In response to this announcement, Liggett immediately increased both its discounts on and promotion of generics. Competitive volleys continued. B&W responded with further discounts, which provoked another response from Liggett. There were five rounds of price cuts—all before B&W actually began shipping its new generic products. *Id.* at 5a. The record evidence establishes that B&W increased its discounts only in response to similar increases by Liggett. *Id.* at 21a-22a. By the time of trial, sales of generic cigarettes had increased dramatically, from approximately 2.8 billion cigarettes sold in 1981 to 61.6 billion cigarettes sold in 1988. *Id.* at 6a.

Liggett, perhaps tired of competing and preferring to litigate, brought this action against B&W in the midst of this "price war." *Id.* at 5a. It initially alleged that B&W had infringed its trademark and had competed unfairly. (It made no Robinson-Patman Act claim at that time.) In the quest for the Golden Fleece of treble damages, Liggett later added a Robinson-Patman claim alleging that B&W had illegally discriminated in price between full-price branded cigarettes and black and white generics. Still in search of a theory, Liggett amended its complaint yet again to allege that the illegal discrimination stemmed from volume discounts on black and white generics alone. *Id.* Before trial, the district court granted partial summary judgment to B&W on the claim that it illegally discriminated between full-price branded and generic cigarettes. After trial, a jury returned a verdict for Liggett on the surviving Robinson-Patman claim and for B&W on the remaining claims. The court then granted B&W's motion for judgment n.o.v. *Id.* at 52a.

The district court set aside the Robinson-Patman Act verdict based on Liggett's failure to establish the requisite elements of its claim, to wit: (1) primary-line com-

petitive injury; (2) a causal link between the alleged discrimination and any competitive injury; and (3) antitrust injury. *Id.* at 24a. Liggett appealed. The court of appeals affirmed the district court's ruling, concluding that Liggett was unable to demonstrate competitive injury since it could not factually support its novel theory of "oligopolistic recoupment." *Id.* at 12a.

Liggett petitioned this Court for a writ of certiorari, presenting three questions for resolution. Unfortunately, these questions have nothing to do with this case. Each of Liggett's hypothetical questions could be answered in its favor without providing any basis for disturbing the rulings below. The court below did *not* decide, as Liggett contends, that the Robinson-Patman Act does not retain "independent force" from the Sherman Act; it did *not* supplant a jury verdict with its own "theoretical speculations"; and it did *not* purport to require actual damage instead of a reasonable threat of injury. Rather, the court of appeals specifically found that this Court's leading primary-line Robinson-Patman Act decision, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), was distinguishable on its facts. It also found that the record evidence (such as the tremendous growth of the generic segment after B&W's alleged predation) undermined Liggett's theory-based claim that B&W could reasonably expect "recoupment." The court of appeals did not even discuss any requirement of actual damage, much less supplant the lesser "reasonable threat to injury" standard posited by Liggett.

SUMMARY OF ARGUMENT

This Court traditionally has—quite correctly—required lower courts to examine closely complaints by companies that a competitor has engaged in predatory (*i.e.*, too low) pricing. Low prices benefit consumers, and legitimate price-cutting is hard to distinguish from predatory pricing. Liggett espouses a novel theory of predatory

pricing that would impose liability on a company with less than a twelve-percent market share that made unilateral price-cuts to compete with the established company in a market segment. This theory, however, was rejected on factual, legal, and economic grounds by the courts below. In industries like grocery and cigarette manufacturing, competition can take a variety of forms—myriads of decisions are made on virtually a daily basis with respect to coupons, rebates, volume discounts, shelf payments, product differentiation, etc. The rules relating to these decisions must be clear, predictable, and rational. Adoption of Liggett's theory would seriously undermine these important goals and penalize companies that unilaterally analyze potential market reaction to their competitive actions. It would also unnecessarily discourage price-cutting to the detriment of consumers.

ARGUMENT

I. PREDATORY PRICING SCHEMES ARE EXTREMELY SPECULATIVE; THIS COURT SHOULD RETAIN ITS HEALTHY SKEPTICISM OF SUCH CLAIMS.

This case involves allegations that B&W priced its generic products too cheaply. In this regard, the Seventh Circuit recently observed, "courts should treat with great skepticism complaints by competitors who are injured by the low prices that customers adore, when the customers are content." *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc*, 881 F.2d 1396, 1403-04 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990).

The Seventh Circuit's teaching was informed by this Court's decision in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), where this Court described the key rationale for the doubts surrounding claims of predatory (too low) pricing schemes: "[T]he success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain de-

pends on successfully neutralizing the competition . . . ." *Id.* at 589.

GMA submits that this Court's healthy skepticism of predatory pricing claims by competitors is appropriate. First, decreased prices benefit consumers. That benefit is tangible and immediate. The harm sometimes associated with "too low" prices is both highly speculative and prospective. As this Court explained:

> A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forego profits that free competition would offer them. The foregone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered . . . .

Id. at 588-89. The Court noted, "[t]hese observations apply even to predatory pricing by a *single firm* seeking monopoly power." *Id.* at 590 (emphasis in original).

Second, without clear *a priori* guidelines, companies would enter into procompetitive "price wars" at their peril. Liggett itself recognizes that there is an extremely fine line between legitimate pricing behavior and predatory pricing. (Pet. Br. at 41). Predatory pricing claims therefore are particularly susceptible to having a factfinder accept a "false positive"—what statisticians refer to as committing a Type II error.[7] Mischaracterization of vigorous price competition as predatory pricing not only

[7] When interpreting data to test a hypothesis, statisticians commonly refer to two types of errors that occur as Type I and Type II errors. Type I errors are false negatives—the improper rejection of the truth. Type II errors are false positives—the improper adoption of a falsity. *See* M. Kendall & W. Buckland, A DICTIONARY OF STATISTICAL TERMS, 66 (4th ed. 1982).

unfairly imposes antitrust liability (and litigation costs) on a competitor, but ultimately denies consumers the fruits of a keenly competitive marketplace.

Many commentators have, in fact, argued that predatory pricing is not as prevalent as believed and that courts have condemned improperly as "predatory pricing" legitimate price competition.[8] Indeed, this Court observed:

> [T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."

Cargill Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 121-22 n.17 (1986) (*citing Matsushita*, 475 U.S. at 594). GMA submits that, on balance, it is sound antitrust policy to attempt to fashion the antitrust rules applicable to predatory pricing in a way that reduces the chance of "false positives" and thereby avoid the unnecessary chilling of procompetitive price-cutting.

Third, the ability of a competitor to employ diverse and flexible pricing strategies is critical to the workings of a competitive U.S. economy. Flexible pricing strategies are, in fact, the cornerstone of a free market. This is especially true in markets, such as cigarette and grocery manufacturing, where competition can be fierce and multifaceted—long established name brands may face

[8] *See, e.g.*, Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (Summer 1971) (examining data on 26 findings of liability for predatory pricing and discovering only three instances of sales below cost with predatory intent that caused a misallocation of resources). *See also* McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J.L. & ECON. 223 (1970).

erosion in sales because of increased sales of other name brands or generics—and where consumer demand may change rapidly and without warning because of changes in taste and lifestyles.

For example, well-known brand name canned vegetables compete with other brand name canned vegetables and generic (including grocery store private label) canned vegetables. With increased emphasis on frozen foods, canned vegetables have seen a significant erosion of sales to frozen vegetables. (Canned vegetables also compete, of course, with fresh vegetables.) Competition in this industry is dynamic, multidimensional, and intense. Companies in this industry must quickly respond to competitive conditions, including rapid changes in consumer tastes or the introduction of new or differentiated products. Innumerable decisions have to be made on a daily basis with respect to such things as coupons, rebates, stickers, volume discounts, shelf payments, and attempted product differentiation. Such actions should not require an attorney in every product manager's office. The antitrust treatment of unilateral pricing decisions must, therefore, take account of this vital need to respond to market conditions.

Fourth, this Court has generally—and quite properly—required close scrutiny of antitrust complaints by competitors. *E.g., Matsushita*, 475 U.S. 574; *Cargill*, 479 U.S. at 121 n.17 ("[c]laims of threatened injury from predatory pricing must, of course, be evaluated with care"). A competitor has a keen interest in chilling vigorous and flexible price (or non-price) competition.

It is for this reason that aggressive statements of intent directed at a competitor should also be questioned, if not completely ignored, in cases brought by another competitor. As the Seventh Circuit noted in *A.A. Poultry*, "[f]irms 'intend' to do all the business they can, to crush their rivals if they can. . . . If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden "intent',

they run the risk of penalizing the motive forces of competition." 881 F.2d at 1401-02 (citations omitted). In fact, the Seventh Circuit noted with approval that Liggett's counsel has advocated ignoring statements of intent in predatory pricing cases brought by competitors. *Id.* Despite these sound reasons for ignoring such evidence in cases like this one, Liggett's case revolves around B&W's statements of its alleged intent. *See, e.g.*, Pet. Br. at 34-35, 42. Indeed, the jury instructions permitted the jury to find for Liggett based on statements of intent alone.[9]

Apart from Liggett's misplaced and inappropriate reliance on statements of alleged "predatory intent," this case presents a particularly appropriate forum for skepticism. Despite over 100 years of experience with the Sherman Act (which has been used to challenge predatory pricing) and over 55 years of experience with the Robinson-Patman Act (under which Liggett brought the claim at issue), Liggett's theory is admittedly novel.[10] Moreover, Liggett's lawsuit is a thinly-veiled response to contemplated entry; Liggett commenced this action promptly in response to B&W's announced plans to enter a segment of the cigarette market then-dominated by Liggett. Indeed, it was not until B&W moved for summary judgment that Liggett invented the theory underlying the claim now before this Court.

---

[9] The jury was not required to find that competitive injury resulted from B&W actually engaging in predatory (below cost) pricing; it was permitted to find such injury based solely on B&W's statements of intent. *See* Pet. Br. at 19.

[10] Liggett has widely publicized the novelty of its argument before this Court, as well as its far-reaching implications. *E.g.*, Rushford, *Attack of the Killer Antitrust Lawyer; Patton, Boggs' Rasmussen Aims Bold Theory at Market Concentration, and Rakes in the Fees*, LEGAL TIMES (Sept. 17, 1990), at 1.

II. THE COURTS BELOW PROPERLY REJECTED LIGGETT'S THEORY OF RECOUPMENT.

The courts below each found that Liggett had failed to establish the requisite elements of its Robinson-Patman claim; the district court pointed to several deficiencies while the court of appeals focused on one—the failure of Liggett to show, as a matter of fact, law, and economics, that B&W could "reasonably expect" to recoup any losses it incurred by predatory pricing.

This Court recognized the necessity of recoupment in *Matsushita* and *Cargill*. Because of the highly speculative nature of predatory pricing, the Court in *Matsushita* upheld summary judgment for defendants because it found that they lacked a "reasonable expectation" of later recovering the losses that they allegedly would incur as a result of the predatory pricing conspiracy. 475 U.S. at 589. This Court recognized that, without such an expectation of "recoupment," a predatory pricing scheme would not be economically rational.[11] The Court then held that, as a matter of law, it would be inappropriate to draw inferences from evidence that would require irrational conduct. *Id.* at 593. *See also Cargill*, 479 U.S. at 119-20 n.15 ("[c]ourts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme"). As discussed below, this is precisely what the courts below determined, *i.e.*, Liggett had failed to proffer any evidence that would show a reasonable likelihood that B&W could conduct a successful predatory pricing scheme. Perhaps as important, the jury was not required to make any such finding—it was permitted to find for Liggett based on statements of intent alone.

In a "traditional" predatory pricing claim, the expectation of recoupment comes from the predator's anticipation

---

[11] Liggett does not dispute that a "reasonable expectation" of recoupment is a requirement of a predatory pricing claim. Pet. Br. at 23-24.

that it will possess monopoly power after it has driven out its competitor. The predator can then raise prices to monopoly levels to recoup its earlier losses. Even in a monopoly situation, recoupment is far from certain. As this Court has explained:

> [I]t is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory pricing scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

Matsushita, 475 U.S. at 589 (emphasis in original).

Here, the "traditional" monopoly model does not work—B&W possessed less than 12% of the relevant market. In light of the existence of much larger competitors, B&W could never recoup its alleged losses because it lacked the power, acting alone, to maintain an increase in prices. But act alone B&W must, since there is no allegation nor finding that B&W acted in combination with its larger competitors. Indeed, Liggett's own economic expert conceded that there was no collusion, tacit or otherwise, in the generic segment of the cigarette market. Pet. App. at 36a.

Liggett therefore was faced with devising a theory that would permit recoupment by B&W. It concocted a theory *never before* used—B&W, acting unilaterally, could reasonably expect to recoup its losses from its alleged predation because the cigarette market is oligopolistic and B&W could count on the other participants to act in a manner that would allow its recoupment scheme to be effective. Specifically, the other competitors would not do anything that would further increase competition in the generic segment, thereby allowing B&W to "discipline" Liggett and recoup its losses from the branded segment. Put most charitably, Liggett argues that B&W possessed the omniscience to incur losses associated with

price predation because it could predict with sufficient certainty that its competitors—similarly omniscient—would not either (a) misperceive B&W's "disciplinary" conduct directed at Liggett as an effort to grab market share or (b) decide that some other action that would frustrate B&W's plan are in their own best interests.[12]

Acceptance of Liggett's theory of oligopolistic behavior would set dangerous precedent. It fails to account for the fragility of any *expectation* about competitors' behavior. In the context of an alleged *express* predatory pricing conspiracy, this Court recognized, "some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation." *Matsushita*, 475 U.S. at 595. This Court's observation applies *a fortiori* here because B&W had no assurance whatsoever that its competitors would not act contrary to its alleged predatory pricing scheme. As Liggett itself observes, "B&W knows that future prices depend upon the choices of fellow oligopolists." Pet. Br. at 29. But B&W's reliance on the *unknown* pricing decisions of others is particularly speculative where, as here, two of the alleged predator's competitors control about 70% of the market.

Liggett also notes—correctly in our view—that B&W would end up incurring *all* of the loss from the alleged predatory pricing, but could only "recoup" a small fraction of the hoped-for oligopoly profits. Pet. Br. at 28-29. Viewed in another light, for every dollar that B&W lost on its alleged predatory scheme, the industry would have

[12] As discussed further below, the record clearly contradicts Liggett's arguments. For example, the district court observed that, at that time, "[f]ive of the six major cigarette companies have significant entries in the [generic] category and growth has been steady. The growth of generic cigarettes has encouraged additional competition . . . on branded cigarettes." Pet. App. at 22a-23a. Today, even Marlboro, the industry's leading brand, has lost market share to generic cigarettes, as that segment continues its steady growth. *See* Shapiro, *Marlboro Smokers Defect to Discounters*, WALL ST. J. (Jan. 13, 1993), at B-1.

to earn approximately ten dollars in supracompetitive profits.[13] This would make any such predation strategy even more unlikely.

Liggett concedes that action by any one of the other cigarette manufacturers would have been sufficient to defeat B&W's alleged expectations. Liggett also concedes that the generic segment was not subject to tacit collusion—let alone parallel behavior—by cigarette manufacturers. This highlights the key, and hazardous, deficiency in Liggett's argument—it lacks a limiting principle. Without regard to the facts of record, Liggett's theory can be applied to any company, no matter how small, in any industry that is allegedly moderately concentrated.

Liggett has simply proffered a theory in search of facts. Even if one accepts the novel prospect of oligopolistic price predation, the courts below found that there was no substantial record evidence supporting Liggett's recoupment theory. First, the district court specifically noted that the other competitors did not share B&W's motive:

> Even before B & W began selling black and white cigarettes, RJR had entered the generic segment by repositioning Doral at generic prices. [Liggett] conceded that RJR had no anticompetitive intent and that Doral's entry expanded the generic segment. The evidence is uncontroverted that RJR's motive for selling generic cigarettes was to regain its number one position in the cigarette industry from Philip Morris. . . . Furthermore, there is no evidence that any of the other major cigarette companies had an interest in slowing the growth of generic cigarettes. Today, five of the six major manufacturers sell generic cigarettes in one form or another.

Pet. App. at 36a. Second, as to B&W's ability to raise prices after Liggett had allegedly been "disciplined"—the

[13] This assumes that B&W would receive about 10%—its approximate market share in the market as a whole—of such excess profits.

imperative element of any recoupment theory—the district court found:

> [I]n late 1985 B & W tried to raise the price of its generic cigarettes. Neither Liggett nor RJR followed with price increases—exactly what is supposed to happen when a company without market power unilaterally raises its price above competitive level. Had there been an alignment of interest, RJR would have followed B & W's lead.

Id. These findings alone should be sufficient to affirm the courts below.

Liggett attempts to lead this Court to believe that it has "successfully" passed through a number of "filters" that distinguish its claim from a baseless claim. Pet. Br. at 42. These filters are ultimately based on B&W's alleged successful prediction of its competitors' behavior. Even ignoring the fact that Liggett's assertions are inconsistent with the specific findings of the district court judge, GMA contends that such filters are inappropriate. Apart from inviting a rash of costly Robinson-Patman Act treble damage litigation by competitors in allegedly oligopolistic markets, Liggett would turn each such case into a jury trial about predictions of others' behavior. But competitors cannot compete in a vacuum. The First Circuit has noted, "[h]ow does one order a firm to set its prices *without regard* to the likely reactions of its competitors?" *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988), *cert. denied*, 488 U.S. 1077 (1989) (emphasis in original). Adoption of Liggett's theory would necessarily chill legitimate, procompetitive behavior.

This Court should therefore reject Liggett's invitation to predicate liability on a new, untested, and highly speculative assessment of competitive injury. It is well-recognized that even an *express* price-fixing cartel is subject to a great deal of uncertainty—each member has economic incentives to cheat. F. Scherer and D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE,

238 (3d ed. 1990). Tacit collusion is even more fragile. In this connection, the district court below stated:

> [A] leading antitrust authority has noted that the scenario for predatory pricing by a firm possessing a small share of the market is "highly speculative" and "presses the potential for tacit price coordination very far." P. Areeda & H. Hovenkamp, ANTITRUST LAW 711.2c, at 538-39 (Supp. 1989).

Pet. App. at 34a. And the simple recognition by one competitor that it is engaged in "game theory," Liggett's theory here, is more fragile still. In a market with six competitors, no single company, let alone one with less than a twelve percent market share, could have a "reasonable expectation" of recoupment in the absence of collusion. Yet Liggett's theory would permit liability based on such an unrealistic expectation and B&W's alleged ability—disproved by the record—to predict that its rivals would refrain from competing in the generic segment once Liggett had been "disciplined."

This Court should specifically require more than the subjective analysis of competitors' future reactions in order to find that there was a "reasonable expectation" of recoupment where there is admittedly no shared purpose or parallel behavior, much less express or tacit collusion. The operative legal standard must distinguish attempts to price aggressively, but legitimately, from predatory pricing schemes. To avoid chilling vigorous price competition, the standard must provide guidance to businesses which may need to react flexibly, quickly, and frequently to competition. The standard should be objective and consistent with encouraging price competition. The standard must not penalize businesses for doing what we would expect of them—to unilaterally analyze their markets and price strategically to maximize profits. Liggett's proposed theory would allow none of this, but would instead encourage treble damage litigation under the Robinson-Patman Act.

CONCLUSION

This Court should reject Liggett's novel theory in this context. Liggett has conceded that there was no collusion on generic cigarettes; its theory was contradicted by the record and would permit improper inferences of irrational behavior. Adoption of Liggett's theory would therefore chill legitimate pricing competition and would be contrary to the purposes of the antitrust laws. It would create undue risks for firms in industries, like the grocery manufacturing industry, where Robinson-Patman Act suits already are commonplace, but where competition can take many forms—by introducing differentiated products, couponing, rebating, shelf payments, market "repositioning" of established products, etc.

Affirmation of the decision below would, in contrast, *not* penalize legitimate, strategic, competitive behavior. It would instead allow companies to react to multifaceted competition without the possibility of "retaliatory" treble damage litigation and permit consumers to enjoy the benefits of such competition.

Respectfully submitted,

TERRY CALVANI *
W. TODD MILLER
PILLSBURY MADISON & SUTRO
1667 K Street, N.W.
Suite 1100
Washington, D.C. 20006
(202) 887-0300
Attorneys for Amicus Curiae

Of Counsel:
ELIZABETH TONI GUARINO
Vice President,
General Counsel
GROCERY MANUFACTURERS
OF AMERICA, INC.
1010 Wisconsin Ave., N.W.
Suite 800
Washington, D.C. 20007

C. DOUGLAS FLOYD
PILLSBURY MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104

* Counsel of Record